

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

**North Lake Tahoe Fire Protection
District; Public Agency Compensation
Trust; Public Agency Risk Management;
and Alternative Service Concepts, LLC,**

Supreme Court No. 70592

**District Court Case No.
A702463**

Appellants,

vs.

**Board for Administration of the
Subsequent Injury Account for the
Associations of Self-insured Public or
Private Employers, and Administrator of
the Nevada Division of Industrial
Relations of the Nevada Department of
Business and Industry,**

Respondents.

RESPONDENT BOARD'S MOTION TO STRIKE

COMES NOW, the respondent, the Board for the Administration of the Associations for Self-Insured Public and Private Employers (the Board), and moves this Court for an order striking page one of the Reply Brief of the appellants, the North Lake Tahoe Fire Protection District (NLTFP) and Public Agency and Trust (PACT), where NLTFP and PACT argue that the Board has no standing to defend its decision to reject NLTFP's application for reimbursement from the Board and the appellants then ask the Court to make the Board suffer

from its alleged predilections, here. The motion is based on the accompanying points and authorities and upon all other documents and records on file herein.

**POINTS AND AUTHORITIES IN SUPPORT OF
RESPONDENT BOARD'S MOTION TO STRIKE**

I. Introduction

Page one of appellants' Reply Brief asserts, without any statutory authority or case law, that the respondent Board for the Administration of the Subsequent Injury Account for the Associations of Self-Insured Public and Private Employers (the Board) is not a party to this dispute and, therefore, has no right to participate in the defense on appeal of its decision to reject the appellants' application for reimbursement from the Account, see, NRS 616B.575, the Board administers. *See*, NRS 616B.575(1) and (6), NRS 616B.578(1) and (6). Presumably, the appellants mean the Board has no standing in these proceedings, and the Board's brief on appeal should be disregarded.¹

For participating in this appeal, the appellants' legal counsel also asks the Court on page one of their Reply Brief, to punish the Board for wrongfully acting

¹The appellants also take relish with the observation that the Board's brief consisted of 43 pages. The brief, it should be noted, met the requirement for the total number of words that might be utilized on appeal. Rule 32.(a) 4-6, Nevada Rules of Appellate Procedure, states that a reply brief on appeal may consist of no more than 14,000 words. The Board's brief consists of 10,326 words, meeting the requirement of the Rule.

as a party herein, (...”because the Board is acting as a party, the District and the PACT respectfully (sic) submit that this Court should, at the very least, make it [the Board] suffer the consequences for asserting this status.” Reply Brief, p. 1. To the contrary, the PACT and District, through its legal counsel, have gone astray and it is this portion of their pleading that should be stricken from the case.

II. Appellants Are Delinquent In Their Challenge to The Board’s Standing to Defend Its Decision Upon Challenge To This Court; Under the Statutory Framework For Creation of the Board, The Board Is Expected to Explain To The Court Its Disposition of Claims And Punishment of Volunteer Board Members For Trying to Do What Is Right Is Simply Beyond the Pale

The appellants’ challenge to the Board’s standing is raised for the first time in the entire appellate process in their instant Reply Brief. The appellants were completely silent on this issue when they filed their opening brief to the District Court. *See*, JA Vol. 2, 384-410. The Board filed its brief in reply to the appellants’ opening District Court brief. *See*, JA Vol. 2, 442-445; JA Vol. 3, 446-451. The Division of Industrial Relations (DIR) filed its notice and statement of intent to participate at the District Court level. JA Vol. 1, 28-29. The appellants then filed their Reply Brief to the Board’s pleading in the District Court. This brief by the appellants was also completely silent about the Board’s standing. JA Vol. 3, 452-468. No argument was raised, either, that the laboring oar in defense of the Board’s decision lay with the DIR.

The appellants took this matter up on appeal to this Court from the District Court's decision affirming the Board's denial of appellants' application. JA Vol. 3, 474-479. The Board participated in the mediation process that is apart of the path to an appeal of an adverse decision at the District Court level. No objection by appellants to the Board's participation in the mediation process was levied or brought to the Board's attention. The appellants' Opening Brief on appeal, is also completely silent on standing, though the appellants surely knew that the Board would appear and oppose the appellants' position before this Court, given the Board's Notice of Intent. *See*, JA Vol. 1, 30-32.

Only in the reply stage of the briefing cycle before this Court, therefore, has the Board's standing to defend its decision been attacked by the appellants. It is well settled that a new argument may not be raised on appeal, especially at the final reply, briefing stage of the process, when the respondent has no chance to challenge the new argument in the ordinary course of the briefing process. *See*, *Nevada State Bank v. Snowden*, 85 Nev. 19, 21, 449 P.2d 254, 255 (1969); *Dream Palace v. Cty of Maricopa*, 384 F.3d 990, 1005 ((9th Cir., 2003). For that reason, alone, appellants' challenge to the Board's standing should be rejected.

The appellants' challenge to the Board's standing also reveals their failure to comprehend the Board's administrative process for disposing of claims. The

process before the Board when administratively deciding applications for reimbursement is not that adversarial in the first place. The applicant submits an application to the DIR for review and analysis. *See*, NAC 616B.7773(a)(2). Upon review of the material submitted by an applicant for reimbursement, the DIR makes a written recommendation to the Board for disposing with the application, along with all of the information which the DIR culls from the material the applicant gave the Board in support of the application. *See*, NAC 616B.7777(1). Simultaneously, the DIR serves upon the applicant, the DIR's recommendation, including the documents which the DIR believes support its recommendation, and a list of witnesses the DIR might call to testify in support of the recommendation. NAC 616B.7777(2).

Next, a hearing is held by the Board. *See*, NAC 616B.7785. If the applicant timely contests the disposition of the Board, a contested hearing is held, generally with a Court reporter present. *See*, NAC 616B.7779, NAC 616B.7787. *See also*, NAC 616B.7783 and 7785. Prior to the hearing the applicant must submit a pre-hearing statement, setting out its position, attaching any documents and records it wants to have admitted into evidence before the Board and a list of witnesses it might call during the course of the hearing. *See*, NAC 616B.7783(2).

At the hearing, the liaison from the DIR to the Board presents its

recommendation to the Board. The applicant, then, presents its case to the Board. *See*, NAC 616B.7785(2). Board members question the DIR and the applicant. When the participants have exhausted their analysis of the matter, the Board, provided a quorum is present, *see*, NRS 616B.572(1), deliberates on the motion in open public and votes to accept or reject the claim for reimbursement in whole or in part, *see*, NAC 616B.7785(5); NRS 616B.578(6), measuring the claim against the statutory requirements. *See*, NRS 616B.575(1).

The decision is entirely the Board's. *See*, NAC 616B.7685(5); NRS 616B.578(6). The DIR only recommends to the Board. NRS 616B.575(1) and (8). The Board makes the final decision, having the authority to accept in whole or in part, or to reject the recommendation of the Board. *See*, NRS 616B.572(1) and (2); NRS 616B.578(6). NAC 616B.7773(1); NAC 616B.7785(5).

Based upon this procedural framework, the appellants, here, argue the Board is not a party to the judicial appellate process and, therefore, should not have the opportunity to defend its decision to the judiciary, to whom appeals are to be taken. *See*, NRS 616B.578(7). The problem with the appellants' view begins with the fact that the Board is not bound to the DIR's position on the claim as the DIR only recommends to the Board. Thus, it could be that the DIR recommends approval of the claim, a position that would obviously be shared by the applicant,

such as the appellant herein.

The Board, however, does not have to accept DIR's recommendation and could reject the claim, despite the fact that both the DIR and applicant believe the claim should be accepted. Were that the case, that the Board took a position on the claim adverse to the DIR and applicant, what happens then, on appeal? If the appellants' theory is followed that the Board has no standing because it has no vested interest in protecting and preserving the Account, that would mean that on appeal, the applicant would be arguing against the decision of the Board. And, if the DIR is supposed to be the only other party to the appeal, that would mean that the DIR would also argue to the appellate court, as the case may be, that the Board was wrong since that was the Administrator's position before the Board. Thus, no one would appear before the appellate court to argue the Board was correct, since, according to the appellants, the Board has no standing to make the argument.

Or, if it is anticipated that someone must be present to defend the Board's decision, by a process of elimination, the DIR would be appearing before the appellate court to argue the Board was correct in its disposition since, according to the appellants, the Board has no standing to explain and defend its own decision. Were that the case, however, the DIR would be forced to argue the legitimacy of the Board's decision, even though it took a position opposite to that outcome

before the Board when recommending claim acceptance.

The appellants' view creates the potential for an untenable conflict of interest, possibly forcing the DIR to argue on appeal a position diametrically opposed to the content of the DIR's recommendation to the Board in the first place. Given the untenable nature of the predicament the DIR would be left to contend with, the appellants' argument that the Board cannot appear and defend its decision on appeal must be rejected. The process clearly contemplates that the Board become a party at the appellate level to defend its own disposition of the cases that appear before it, unless it is proper to put the DIR in a position where it is forced to argue against itself in the defense of the Board's decision.

Statutorily, the Board is the ultimate defender and custodian of the Account. It administers the Account and its administration must be consistent with NRS 616B.575, NRS 616B.578 and NRS 616B.581. *See*, NRS 616B.572(2). With this vested interest in the Account, plainly the Board retains standing to protect its decisions made in furtherance of its duty to protect the Account. Its authority is plenary, as it is vested, further, with the power to develop regulations and procedures for the administration of the Account, consistent with its statutory mandate. *See*, NRS 616B.572(1); NRS 616B.575(6); NRS 616B.578(6).

Finally, the appellants pile on the Board, by asking the Court to make the

Board suffer for attempting, here, to defend its decision. This request is made without citation to case law or statute. It flows from a baser place and the speculative wings of fancy. The simple fact of the matter is, the Board members are volunteer appointees of the Governor. *See*, NRS 616B.569. They receive no compensation for their services, though considerable time and effort go into membership on the Board. *See*, NRS 616B.569(4). Board members must review a significant and complicated volume of material in support of the claims brought to the Board as the Board packet for this case reveals. *See*, JA Vol. 1, 67-141. Moreover, multiple packets must be reviewed by the Board, as it is not uncommon for several applications to be decided at a single meeting of the Board. Further, as in this case, matters get continued or the applicant is allowed to come back to the Board and submit additional information before a final decision of the Board is made. All of this takes time, as well.

The appellants ask the court to make uncompensated Board members suffer. Since the appellants are simply seriously lacking in their comprehension of the administrative process before this Board, there is no reason to make the Board suffer in the first place.

CONCLUSION

The motion to strike should be granted. The Board also seeks all other

relief deemed necessary in the premises.

The undersigned does hereby affirm that the preceding pleadings do not contain the social security number of any person.

Dated this 13th day of December, 2017.

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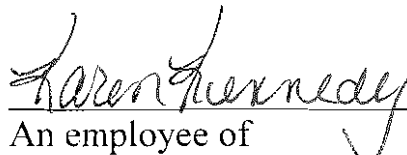
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The Board for the Administration of
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Self-insured Public and Private
Employers

Certificate of Service

Pursuant to NRCPP 5(b), I certify that I am an employee of The Law Offices of Charles R. Zeh, Esq., and that on this date I served the attached *Respondent Board's Motion to Strike*, on those parties identified below by:

√	<p>Placing an original or true copy thereof in a sealed envelope, postage prepaid, placed for collection and mailing in the United States Mail, at Reno, Nevada:</p> <p>Robert F. Balkenbush, Esq. Thorndal Armstrong Delk Balkenbush & Eisinger 6590 S. McCarran Blvd., Suite B Reno, NV 89509</p> <p>Donald C. Smith, Esq. Jennifer J. Leonescu, Esq. Department of Business and Industry Division of Industrial Relations 1301 North Green Valley Parkway, Suite 200 Henderson, NV 89074-6497</p>
	Personal delivery
	Telephonic Facsimile at the following numbers:
	Federal Express or other overnight delivery
	Reno-Carson Messenger Service
	Certified Mail/Return Receipt Requested

Dated this 13th day of December, 2017.


An employee of
The Law Offices of Charles R. Zeh, Esq.